No. 15,913

United States Court of Appeals

For the Ninth Circuit

JOSE DIAS DE SOUZA,
Appellant,

vs.

BRUCE G. BARBER, Director of Immigration and Naturalization,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

FREDRICKS & SULLIVAN,
316 Flood Building, 870 Market Street,
San Francisco 2, California,
Attorneys for Appellant.

GUERNSEY CARSON,
950 Mills Tower,
San Francisco 4, California,
Of Counsel.

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JURISDICTION.

This is an appeal from an order of the District Court denying a writ of habeas corpus to review deportation proceedings. Jurisdiction lay in the District Court through Title 8, U.S.C., sec. 2241. This Court has jurisdiction by virtue of section 2253 of said Title.

Appellant de Souza, an alien, was born in 1909, admitted for permanent residence in the United States in 1912, and was deported in 1930 following deportation proceedings in 1929 while he was still a minor.

De Souza re-entered the country in 1957, was served with notice, was given a hearing, and was ordered deported under the 1929 order pursuant to section 242 f

of the Immigration and Nationality Act of 1952 (8 U.S.C. 1252 f).

The alien's appeal to the Board of Immigration Appeals was dismissed on January 7, 1958, and he was taken into custody January 8th. On January 9, 1958, his Petition for Writ of Habeas Corpus was filed, an order to show cause was issued thereon, and appellee's return and answer thereto was filed on January 14, 1958.

On February 12, 1958, the Honorable O. D. Hamlin, United States District Judge, signed and filed an order denying the petition for a writ of habeas corpus. Notice of Appeal to this Court was filed February 14, 1958.

STATUTES AND AMENDMENT TO CONSTITUTION.

8 U.S.C. sec. 1251

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

. . .

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, . . .

8 U.S.C. sec. 1101

(a) As used in this chapter—

. . .

(13) The term "entry" means any coming of an alien into the United States, from a foreign

port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purpose of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary; . . .

8 U.S.C. sec. 1252

. . .

(f) Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952, on any ground described in any of the paragraphs enumerated in subsection (e) of this section, the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) of this section the date on which the finding is made that such reinstatement is appropriate shall be deemed the date of the final order of deportation.

(e) Any alien against whom a final order of deportation is outstanding by reason of being a member of any of the classes described in paragraphs (4) . . . of section 1251 (a) of this title. . . .

8 U.S.C. sec. 1252

(b) . . .

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this chapter, or of any other law or treaty, the decision of the Attorney General shall be final. . . .

8 C.F.R. sec. 242.6

Aliens deportable under section 242 (f) of the act. In the case of an alien within the purview of section 242 (f) of the act, the order to show cause shall charge him with deportability only under section 242 (f) of the act. The prior order of deportation and evidence of the execution thereof, properly identified, shall constitute prima facie cause for deportation under that section.

8 C.F.R. sec. 242.22

Proceedings under section 242 (f) of the act—(a) *Applicable regulations.* Except as hereafter provided in this section, all the provisions of sections 242.8 to 242.21, inclusive, and section 242.23 shall apply to the case of a respondent within the purview of section 242.6.

(b) *Deportability.* In determining the deportability of an alien alleged to be within the purview of section 242.6, the issues shall be limited solely to a determination of the identity of the respondent, i.e. whether the respondent is in fact an alien

who was previously deported . . . whether the respondent was previously deported as a member of any of the classes described in paragraph (4) . . . of section 241 (a) of the act; and whether respondent unlawfully reentered the United States.

(c) *Order.* If deportability as charged pursuant to section 242.6 is established, the special inquiry officer shall order that the respondent be deported under the previous order of deportation in accordance with section 242 (f) of the act. . . .

U.S. Constitution, Amendment 5

No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE.

This is an appeal from an order denying a writ of habeas corpus sought by the appellant alien upon his being taken into custody pursuant to an order of deportation.

Appellant's immigration record, referred to by the District Judge (R. 15) is the government's exhibit No. 1. That record discloses that appellant Jose Dias de Souza was born in Portugal on June 4, 1909. In February 1929, at the age of 19, appellant was sentenced to serve from one to 14 years in San Quentin prison on a charge of issuing a bank check with intent to defraud.

At the age of 19, appellant entered San Quentin on March 12, 1929. The record shows that two days later,

on March 14, 1929, he signed a paper before U. S. Immigration Inspector J. W. Howell stating that his age was then 19, that he was born June 4, 1909, and that he left the United States and entered the United States at Calexico, California, in February, 1926.

The exhibit contains what purports to be a transcript of a "record of investigation" conducted at San Quentin on May 14, 1929, by J. W. Howell, Examining Inspector, with F. E. Tuttle, Acting Spanish Interpreter, and R. H. Rule, Stenographer, present. The transcript is certified by R. H. Rule to be a "true and correct transcript of the record of investigation in this case." The transcript does not appear to be signed by de Souza. In said transcript of May 14, 1929, appellant de Souza again purportedly admitted a trip to Mexico in February, 1926.

The exhibit next contains a warrant of arrest dated June 7, 1929, issued by P. F. Snyder, Assistant to the Secretary of Labor. The warrant states that from evidence submitted to the said Snyder it appears that de Souza "who landed at the port of Calexico, California, on or about the 15th day of February, 1926, has been found in the United States in violation of the immigration act of February 5, 1917 for the following among other reasons:

> "That he has been sentenced subsequent to May 1, 1917, to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude to-wit: issuing bank checks with intent to defraud, committed within five years after his entry."

There next appears in the exhibit a report of a hearing at San Quentin, dated October 4, 1929, conducted by J. A. Nielson, Jr. Said report consists in part of a form reading: "Said alien was informed that the purpose of said hearing was to afford him an opportunity to show cause why he should not be deported to the country whence he came, said warrant of arrest being read and each and every allegation therein contained carefully explained to him. Said alien was offered an opportunity to inspect the warrant of arrest and the evidence upon which it was issued, which privilege was ..... accepted. The alien being first duly sworn the following evidence was presented: Q. What is your correct name? A. *Joseph Marcus Souza.* Q. Have you ever been known by another name? A. *No.* Q. You are advised that under these proceedings you have the right to be represented by counsel. Do you desire to obtain the services of a lawyer? A. *No. I can handle this myself . . .*"

The balance of the October 4 hearing report is not in form. It continues: "Q. Do you waive your right to be represented by an attorney and are you now ready and willing to proceed with this hearing? A. Yes. Q. You are advised that Attorney W. D. Hahesy, of Tulare, California, has stated that he wished to be present at this hearing. Is it your wish that he be present at this hearing and represent you in these proceedings? A. No. He was not hired by me. I don't want his services whatsoever. Q. You waive your right to the services of Attorney Hahesy? A. Yes. . . ."

Appellant, according to the report, was then asked whether he had made a sworn statement to an immigration inspector on May 14, 1929, whether the answers given therein were true, and whether any changes were desired. De Souza purportedly admitted the truth of the statement made on May 14th.

The report continues with a statement by the Inspector that the May 14 statement is now incorporated into this record. When asked if he had any evidence to offer or reasons to give why he should not be deported, de Souza purportedly answered as follows:

> "I was working for Mr. A. C. Glass, who is in the produce business at the Terminal Market, 7th and Central, Los Angeles, and in the course of my duties I crossed the line into Mexico on numerous occasions. I never did stop over there more than an hour and a half at any time. I never lived in Mexico. All my people are here. They are taxpayers and haven't been out of the country for about 18 years. I was raised and educated here, and know no other country whatsoever. The reason I am not a citizen is because I haven't reached my majority. My two brothers are naturalized citizens."

In his summary, Nielson noted that the alien "is a male 19 years of age." He recommended deportation stating that "the charge contained in the warrant of arrest is sustained by the record."

The foregoing is the only "evidence" in the record. On December 2, 1929, P. F. Snyder, the Assistant to the Secretary of Labor, issued his deportation warrant containing the preamble: "Whereas from proofs

submitted to me after due hearing before Immigration Inspector J. A. Nielson, Jr., held at San Quentin, California, I have become satisfied that the alien Jose or Joseph Marcus Souza who landed at the port of Calexico, California on or about the 15th day of February, 1926, has been found in the United States in violation of the immigration act of February 5, 1917, to wit: . . ."

One year later, on December 2, 1930, the deportation warrant was executed. De Souza was deported at Galveston, Texas.

Appellant last entered the United States on June 29, 1957, with no visa. He was served with an order to show cause on which a hearing was had on August 22, 1957. The transcript of that hearing is included in the government's exhibit No. 1. The order to show cause reveals that appellee was proceeding under section 242 (f) of the Immigration and Nationality Act (8 U.S.C. sec. 1252 f). The Special Inquiry Officer pointed out he deemed the issues to be limited to (1) identity, (2) former deportation, and (3) unlawful reentry.

The transcript of August 22, 1957, as well as the brief on behalf of the government dated October 3, 1957, prepared by John J. Kelleher, the examining officer at the hearing, both disclose the contentions of counsel for appellant: that the government's case was based solely on the 1929 proceedings which were had in violation of appellant's right to due process; that there was no evidence except the admissions of the minor alien who was incarcerated at the time and

for whom no guardian or lawyer was appointed; that evidence should be admitted on the pivotal question of "entry" in 1926; that the Special Inquiry Officer should look into the validity of the 1929 proceedings instead of limiting the issues as he did.

The Special Inquiry Officer found appellant deportable under section 242 (f) of the Act (8 U.S.C. sec. 1252 f) on September 3, 1957. On January 3, 1958, the Board of Immigration Appeals dismissed the appeal taken on September 3, 1957. Appellant was taken into custody, and on January 9, 1958, his petition for writ of habeas corpus was filed in the southern division of the United States District Court for the northern district of California. (R. 3.) The writ was denied on February 12, 1958. (R. 15-17.) Notice of appeal to this Court was filed on February 13, 1958. (R. 18.)

SPECIFICATION OF ERRORS.

1. The District Court erred in refusing to review the 1929 deportation proceedings for fairness, for evidence to support the finding, and for error of law.

2. The District Court erred in refusing to grant the writ and discharge appellant where the deportation order was founded upon an infant's admission alone and was not based on reasonable, substantial and probative evidence as required by law.

3. The District Court erred in refusing to grant the writ and discharge appellant where the deportation order was contrary to law and based on an erro-

neous application of law, (8 U.S.C. sec. 1251 (a) (4)), and where appellant's offer of evidence was refused.

4. The District Court erred in refusing to grant the writ and discharge appellant where the reinstated 1929 deportation order under which he was herein ordered deported was obtained in violation of appellant's constitutional right to due process of law, particularly in view of the circumstances that his "hearings" were held while he was a minor, incarcerated in San Quentin, without guardian or lawyer.

SUMMARY OF ARGUMENT.

The matter of deportation of a resident alien is administrative and the Courts have no general power to review the proceedings if they were fair, if the finding of deportability was based upon evidence and if no error of law was committed. But if any one of those elements is missing, the proceedings are void and the Courts have the power and the duty to set aside the order. All three elements are missing here.

The Immigration Act specifically states that no deportation decision shall be valid unless it is based upon reasonable, substantial, and probative evidence. The only evidence of an entry within five years of the sentencing in this case is the admissions attributed to appellant purportedly obtained from him during his minority, while he was incarcerated, unprotected and unrepresented. Such "evidence" is no evidence. An infant cannot effectively admit.

In the circumstances, appellant's alleged "entry" at age 16 at the direction of his employer, did not constitute an entry within the act. At least the District Court should have remanded the matter to appellee in order to afford appellant an opportunity to present evidence of the circumstances and an opportunity to have a fair hearing on the merits.

Proceedings in deportation must meet the fundamental requirements of fairness encompassed by the due process clause of the Fifth Amendment of the Constitution. Due process was glaringly absent from the 1929 proceedings. Appellant was questioned two days after being imprisoned and again two months later. He was 19 years old at those times. Some months later when he was 20 years old another "hearing" took place in the prison. On none of those three occasions was he represented by a guardian. He did not intelligently waive his right to be represented by counsel. Legally he could not waive so fundamental a right. On the basis of purported admissions by him on those occasions, and solely on that basis, he was deported. The law does not permit an infant to admit away his rights—he is deemed incapable. There was no due process. The writ should have been granted.

ARGUMENT.

I. THE ADMINISTRATIVE PROCEEDINGS ARE SUBJECT TO COLLATERAL ATTACK.

The government is attempting to deport appellant under the 1929 order of deportation in accordance

with the provisions of section 242 (f) of the Act. The District Court was under no misapprehension on that fact. (R. 16.) Nevertheless, the Court said:

> "The petitioner would have this Court disinter his first deportation order which was issued in 1930 and examine the evidence upon which it was based; he claims it was invalidly issued. I do not believe I am permitted to do that. United States ex rel. Steffner v. Carmichael, (5 Cir., 1950) 183 F. 2d 19. . . ."

Appellant does urge most strongly that those prior proceedings be examined. There is a basic infirmity in those proceedings which the District Court should have recognized as a command to discharge the appellant. Incidentally, it is not the appelant who would have the Court "disinter" the prior order—the government has based its present order upon those prior proceedings:

> ". . . such alien shall be deported under such previous order . . ." (8 U.S.C. sec. 1252 f; R. 16).

The erroneous reasoning of the Court, disclosed in its Order (R. 15-17), is that once there have been prior proceedings resulting in an order of deportation, that order of deportation is inviolate, those proceedings unimpeachable. Such is the fundamental error in this case.

A clear statement of the true rule appears in *U.S. ex rel. Schlimmgen v. Jordan,* 164 F. 2d 633, 634:

> "Courts may not interfere with administrative determinations unless, upon the record, the proceedings were manifestly unfair, or substantial

> evidence to support the administrative finding is lacking, or error of law has been committed, or the evidence reflects manifest abuse of discretion . . ."

The rule, quite naturally, is approved by the Supreme Court. (*Low Wah Suey v. Backus,* 225 U.S. 460, 32 S.Ct. 734, 56 L.Ed. 1165; *Kessler v. Strecker,* 307 U.S. 22, 59 S.Ct. 694, 83 L.Ed. 1082.)

What was overlooked by the District Court is the all-important clause following the word "unless." Even in the *Steffner* case cited by the Court, the qualification was recognized. The Circuit Court there said (183 F.2d 19, 20):

> "Where an alien has been deported from the United States pursuant to a warrant of deportation, we do not think it permissible to allow a collateral attack on the previous deportation order in a subsequent deportation proceeding *unless we are convinced that there was a gross miscarriage of justice in the former proceedings. . . .*" (Stress added.)

In that case, the Court pointed out that the alien had his day before the immigration authorities. In the case here on appeal, it appears that appellant never had his day before the immigration authorities.

What the Court meant by the words "gross miscarriage of justice" cannot be known. But what is required to set aside the administrative proceedings has been clearly spelled out by the Supreme Court in *Kessler v. Strecker,* supra, 307 U.S. 22, 34:

> ". . . The proceeding for deportation is administrative. If the hearing was fair, if there was

> evidence to support the finding of the Secretary, and if no error of law was committed, the ruling of the Department must stand and cannot be corrected in judicial proceedings. If on the other hand one of the elements mentioned is lacking, the proceeding is void and must be set aside . . .''

There must, above all, be a fair hearing. There must be evidence to support the finding of deportability. There must be no error of law.

A moment's thought on the matter shows that the rule is sound. Congress has control of deportation, and the executive branch of government must enforce the laws, but in a non-exclusion case, at least, the alien is entitled to the protection of the Court as to matters of fundamental fairness (as distinguished from weighing the evidence or determining the facts *de novo*). In *Whitfield v. Hanges,* 222 F. 745, 751, the Court recognized that upon contradictory evidence the administrative body may not be reversed by the Courts, but the question of whether or not there is any substantial evidence to support the finding is one of law ''the power and duty to determine which are vested in the Courts, and any injurious error in deciding that question by any executive or quasi judicial officer or tribunal is reviewable and remediable by them. Administrative orders and findings quasi judicial in character are void if the finding is contrary to the 'indisputable character of the evidence.' . . .''

The bases for collateral attack appear to be clear. If one or more exist, the time lapse should present no problem. Since the prior proceedings are now

being presented as the basis for deportation, the government cannot complain if a court for the first time tests the fairness of those proceedings. So long as grounds exist in fact upon which a collateral attack is permitted, the proceedings must be set aside. The passage of time, alone, has never deterred the Courts. In *U.S. ex rel. Rubio v. Jordan,* 190 F.2d 573, 575-576, the Court recognized the rule that collateral attacks are not permitted unless the Court is convinced of a gross miscarriage of justice. The Court concluded:

> "Here we find no such gross miscarriage of justice in the former deportation proceedings as would justify our review of those proceedings. At each step the petitioner was represented by counsel . . ."

In that case several years elapsed between the prior and later proceedings, but that was not a cause for refusal to review.

In *Pennsylvania ex rel. Herman v. Claudy,* 350 U.S. 116, 76 S.Ct. 223, 100 L.Ed. 126, eight years elapsed. In *Mooney v. Holohan,* 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, eighteen years elapsed. Those were criminal cases, to be sure, but an alien is subject to as great a loss as the criminal. Deportation may deprive a man "of all that makes life worth living." (*Ng Fung Ho v. White,* 259 U.S. 276, 284, 42 S.Ct. 492, 495, 66 L.Ed. 938.) "Deportation is a drastic measure and at times the equivalent of banishment or exile." (*Fong Haw Tan,* 333 U.S. 6, 10, 68 S.Ct. 374, 376, 92 L.Ed. 433.)

In *Bridges v. Wixon,* 326 U.S. 135, 154, 65 S.Ct. 1443, 1452, 89 L.Ed. 2103, the Court said:

> ". . . We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."

At the administrative level likewise the lapse of time alone is not a deterrent. A discussion of several cases can be found in *In the Matter of S..... In Deportation Proceedings,* 3 I. & N. 83.* At page 85, *In Matter of F.....* is discussed where a 1931 deportation was reviewed in 1944. The former proceedings were determined, at the later hearing, to have been erroneous as a matter of law. At page 86, *In Matter of F.....* is discussed. There, the former proceedings took place in 1920 and the present inquiry in 1947. The earlier proceedings were set aside as incorrect as a matter of law. *In Matter of S..... Q.....*, is cited and quoted at page 86. There the former proceedings took place in 1929. Eighteen years later the Board of Immigration Appeals held:

> "The findings of deportability made upon the basis of the 1929 deportation hearing are not, of

*The full title of volume is: Administrative Decisions Under Immigration & Nationality Laws.

> course, binding upon us in this proceeding. We are free to examine the 1928 hearing record to ascertain whether or not the alien's prior deportation was lawful. If there was no evidence to support the warrant charges, or if there was an erroneous application of law, the prior determination of deportability may be set aside.
>
> In finding the alien subject to deportation as a prostitute in 1928, the immigration authorities improperly applied the rule of law set forth in the Mittler case . . . On the basis of the Daskaloff case, we must set aside the 1928 deportation."

The latter case referred to is *Daskaloff v. Zurbrick,* 103 F.2d 579. That case stated that no collateral attack was available, but the Court nevertheless looked into the prior proceedings and found (1) the alien was awarded a full and fair hearing (2) there was evidence upon which the order could have been predicated, and (3) there was no erroneous application of law. Beyond these inquiries, of course, as the Supreme Court has stated, the Courts have no power. But it is exactly these inquiries that the District Court should have made in the instant case. Appellant in the instant case has not had a fair hearing, there was no evidence of entry in 1926, and the determination that an entry had taken place was based upon an erroneous rule of law.

We shall burden this Court with one final quotation from the Administrative Decisions (3 I. & N. 83, 86), because the language of the Board of Immigration Appeals is particularly appropriate. At page 86, *In*

Matter of M..... appears. The alien had previously been deported in 1940 on the ground that he had been convicted of a turpitude crime within five years of entry. Prior to his deportation, *U.S. ex rel. Guarino v. Uhl,* 107 F.2d 399, came down holding that mere possession of burglary tools (of which crime the alien had been found guilty) was not an offense involving moral turpitude. The Board of Immigration Appeals is quoted:

> "When the respondent was deported in April 1940, the *Guarino* case, *supra,* had been decided and that decision was considered the law. Accordingly, his deportation at that time on a charge considered then to be invalid was clearly erroneous. To sustain the present deportation charges, based on the act of March 4, 1920, as amended, would be only continuing this error. There is no reason why this Board cannot take steps in these proceedings to correct a past error. Such action, we feel, is not contrary to the well-established principle that judicial decrees or judgments may not be collaterally attacked. In this way, substantial justice will be accomplished, and more especially so under the circumstances of this case where the alien is already in the United States and his deportation is sought on a ground based on a past mistake. We shall, therefore, not sustain those charges."

In the instant case, the 1929 proceedings were manifestly unfair; there was no substantial evidence, or, indeed, any evidence to support the finding; and error of law was committed. In such circumstances, the Board of Immigration Appeals stated that substantial

justice would require the correction of the past mistake, and such action would be a valid collateral attack. We asked the District Court to correct the past mistake in the instant case. We ask this Court to do equal justice.

II. THE DEPORTATION FINDING WAS NOT SUPPORTED BY VALID EVIDENCE.

Appellant was deported in 1930 upon the ground that he had been sentenced to a term of more than one year in prison for a crime involving moral turpitude within five years of entry. To support the order of deportation the government had to prove the sentence and the entry. The only evidence of the entry is the purported admission of appellant immediately after he was imprisoned in San Quentin, during his minority.

Due process to one side, the admissions of an infant cannot be used against him, and certainly cannot satisfy the requirements of the act, viz.:

> "No decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." (8 U.S.C. sec. 1252 (b) (4).)

The purported admissions of appellant should be considered a nullity and stricken from the record. Story, *Equity Pleading,* sec. 871 speaking of infants states:

> ". . . He is considered as incapable of entering into the unlawful combination; and his answer cannot be excepted to for insufficiency; *nor can*

any admission made by him be binding." (Stress added.)

The Supreme Court quoted the above statement in *White v. Miller,* 158 U.S. 128, 146, 15 S.Ct. 788, 39 L.Ed. 921. Also in that case, the Court had the following to say (p. 146):

> "In *Wright v. Miller,* 1 Sandf.Ch. 109, it was held that the answer of an infant defendant by his guardian ad litem is not binding upon him, and no decree can be made on its admission of facts. Where relief is sought against infants, the facts upon which it is founded must be proved; they cannot be taken by admission; and *Wrottsley v. Bendish,* 3 P.Wms. 236, was cited to that effect.
>
> "Where there are infant defendants, and it is necessary in order to entitle the complainant to the relief he prays, that certain facts should be before the court, such facts, although they might be the subject of admissions on the part of adults, must be proved against the infant.' 1 Daniel's C.P. 238; *Mills v. Dennis,* 3 John.Ch. 367."

In *Bank of U. S. v. Ritchie,* 33 U.S. 128, 8 L.Ed. 890, a judgment was obtained against minors concerning property. A guardian ad litem had been appointed upon the motion of plaintiff's counsel without notice to the infants. The guardian answered and admitted liability for the infant. At page 145 the Supreme Court held:

> "The court could not have acted on this admission. The infants were incapable of making it, and the acknowledgment of the guardian, not on

> oath, was totally insufficient. The court ought to have required satisfactory proof of the justice of the claims, and to have established such as were just before proceeding to sell the real estate."

On the above authorities it is clear that the government should not be permitted to act upon the admissions appearing in the record. This is not a case where the evidence is merely insufficient to meet the standards of the act like *Mouratis v. Nagle,* 24 F.2d 799 and *Ex Parte Fierstein,* 41 F.2d 53, where this Court reversed the orders of the District Court denying the writ. The question here is not whether there is enough evidence to warrant deportation. The question is whether there is any evidence at all cognizable by law.

Wholly aside from the fact that the hearings in 1929 violated appellant's right to due process, it is here argued that the only evidence of a 1926 entry consists of the record entries wherein a minor, newly imprisoned, admittedly without lawyer or guardian, is supposed to have admitted the fact. Since those admissions cannot bind the minor, there is no evidence in the record.

III. NO ENTRY WAS PROVED; THE FINDING THEREON BEING BASED ON AN ERRONEOUS APPLICATION OF LAW.

In 8 U.S.C. sec. 1101 (a) (13) Congress has stated:

> ". . . an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for

> the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary . . ."

Assuming for the purposes of this argument the facts stated in the government's exhibit (Report of Hearing conducted by Inspector J. A. Nielson, Jr., at San Quentin October 4, 1929; and Statement taken at San Quentin May 14, 1929) that at the age of 16 appellant went to Mexico in the course of his employment and remained for no more than an hour and a half, it is respectfully submitted not only that such statements are not valid evidence, but also that the departure was not intended, or reasonably to be expected by appellant, or voluntary.

Throughout this proceeding, counsel for appellant has offered to prove those contentions, but their offer was not accepted. (See transcript of August 22, 1957 hearing in the exhibit.)

Where a boy of 16 is sent by his employer to make delivery of produce in Mexico, and where such trip requires only an hour and a half at most, his return cannot be deemed to be an entry within the requirements of the statute. His departure was not expected, intended or voluntary.

In *Valenti v. Karnuth,* 1 F.Supp. 370, 373, the voluntary aspect of a minor's conduct was examined. The Court said:

> "A schoolboy of 16, in an American public school, told with the others of his class that the class would go across Lake Erie to a Canadian beach for a day's picnic, and who goes with the teacher and class and returns with them, is not possessed of freedom of action to decide whether or not he will go. *He is not a free agent acting entirely of his own volition . . .*" (Stress added.)

Appellant, at the age of 16, sent by his employer in the course of his occupation into Mexico, is likewise not a free agent. He is no more competent to exercise his own volition than is a schoolboy under the supervision of his teacher.

To say that such a trip across the border and back constitutes an entry that is voluntary, reasonably to be expected, and intended by a boy of 16 is to give a "capricious application" to the law in the words of the Supreme Court in *Delgadillo v. Carmichael,* 332 U.S. 388, 68 S.Ct. 10, 92 L.Ed. 17. In that case the alien having shipped on a U. S. merchant ship during the war was taken to Cuba when his ship was torpedoed after it had passed through the Panama Canal. He returned to the United States after remaining one week in Cuba for treatment. Thereafter, within five years, he was convicted of robbery, and deportation proceedings were had. The Supreme Court held that there was no entry since he was forced to enter the foreign port, he did not select it.

In the foregoing case the Supreme Court distinguished *U.S. ex rel. Clausson v. Day,* 279 U.S. 398, 49 S.Ct. 354, 73 L.Ed. 758; *U.S. ex rel. Stapf v. Corsi,*

287 U.S. 129, 53 S.Ct. 40, 77 L.Ed. 215; and *U.S. ex rel. Volpe v. Smith,* 289 U.S. 422, 53 S.Ct. 665, 77 L.Ed. 1298, as cases where the alien plainly expected or planned to enter a foreign place. The Court also cited *DiPasquale v. Karnuth,* 158 F.2d 878, where an adult alien aboard a sleeping car passed through Canada and back into the United States. Such entry into the country was not one within the meaning of the law. A similar case is *Wong Yuen v. Prentis,* 234 F. 28, where a Chinese alien rode into Canada and back again in a freight car. There was no entry.

The law of this Circuit at the time of appellant's alleged entry was established by *Ex parte T. Nagata,* 11 F.2d 178, decided in February, 1926. In that case an alien seaman left the United States and went fishing in Mexican waters. His return constituted no entry within the meaning of the act. The Court said (p. 179):

> ". . . If an alien who has acquired the right to reside in the United States must forfeit that right when, in the course of his ordinary business, as a seaman on a domestic vessel, he is carried into foreign waters, the result is harsh indeed, and is one which I do not believe was intended by any provision of the immigration law."

Even in the case of adults it is seen that the mere physical return to this country is not necessarily an "entry" within the meaning of the immigration law. Another 9th Circuit case in effect during the period in question is *Weedin v. Banzo Okada,* 2 F.2d 321.

There an alien seaman went ashore for a few hours in Australia. This was held not to change his status.

Brevity of the stop-over in the foreign place is not alone the determining factor. We are not unaware of the leading cases from the Supreme Court, *Lapina v. Williams,* 232 U.S. 78, 34 S.Ct. 196, 58 L.Ed. 515, and *Lewis v. Frick,* 233 U.S. 291, 34 S.Ct. 488, 58 L.Ed. 967, often cited for the proposition that the length of time out of the country does not aid the alien. In both of those cases, however, the entry itself was tainted. In the first, the alien was a prostitute practicing in this country before she left and intending to continue upon her return. Her entry, therefore, was colored by the fact that she was an undesirable in the eyes of Congress. In the second, the alien went to Mexico in order to bring back a woman for purposes of prostitution. In the case on appeal, the only office of the alleged entry was to serve as a point of departure from which the five year period could be measured. In and of itself appellant's "entry" was not prohibited or tainted. Therefore, even if an adult were involved, the above cases would not control. We are here dealing with a boy 16 years old, told by his employer to deliver goods across the border. The boy did not voluntarily leave. He was not a free agent. He was an alien with a lawful residence in this country. He should not be held to have forfeited his right to remain in this country because of the involuntary trip. Had he been engaged in some criminal activity in crossing the border, he would have come within the proscription of Congress.

It is respectfully submitted that there has been an erroneous application of law in the determination that appellant made an entry in 1926.

IV. APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW WAS VIOLATED.

An alien, being a "person" has the same right to protection under the due process clause of the Fifth Amendment as a citizen. *(Galvan v. Press,* 347 U.S. 522, 530, 74 S.Ct. 737, 98 L.Ed. 911.) While it is true that Congress has the policy-making power over aliens and the executive branch of government must enforce the policies established, the procedural safeguards of due process must be respected. (Japanese Immigrant Case: *Yamataya v. Fisher,* 189 U.S. 86, 101, 23 S.Ct. 611, 47 L.Ed. 721; *Wong Yang Sung v. McGrath,* 339 U.S. 33, 49, 70 S.Ct. 445, 94 L.Ed. 616.)

Appellant here contends that the record before the District Court consisting of the government's exhibit reflects an absence of due process in the 1929 hearings and proceedings.

We respectfully ask this Court to consider the following *combination* of circumstances:

1. A 19 year old boy is imprisoned in a state penitentiary with the concomitant lack of freedom to seek friends or other aid.

2. Within 2 days, he is asked to sign a statement before immigration authorities containing a pivotal "admission."

3. Two months later, he is subjected to another hearing while still only 19. The same admission is purportedly obtained.

4. A few months later another hearing is held —he is a little over 20 years old.

5. At none of the hearings is he represented by friend or guardian.

6. At none is he represented by a lawyer.

7. He is incompetent as a matter of law.

8. He is incompetent in fact. ("I can handle this myself."!)

9. The government produced no evidence.

10. The only evidence in the record is the incompetent "admission" of the infant.

We do not here argue that this is a Sixth Amendment case. While we have shown that this is as serious a matter to appellant as would be a criminal appeal, we do not urge that he had an absolute right to counsel in the immigration proceedings in 1929 for that reason.

We do not here argue that the proceedings lacked the requisite fairness of due process solely because appellant was imprisoned at the time.

We do, however, earnestly assert that they are factors to be considered with the other circumstances in determining whether the fundamentals of fairness were present. How was the alien of 19 protected by due process when he was questioned two days after

being imprisoned in San Quentin? In *Whitfield v. Hanges,* 222 F. 745, 749, the Court said:

> "Indispensable requisites of a fair hearing according to these fundamental principles are that the course of proceeding shall be appropriate to the case *and just to the party affected;* that the accused shall be notified of the nature of the charge against him *in time to meet it;* that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine the witnesses against him; that he may have time and opportunity after all the evidence against him is produced and known to him to produce evidence and witnesses to refute it; that the decision *shall be governed by and based upon the evidence at the hearing, and that only;* and that the decision shall not be without substantial evidence taken at the hearing to support it . . . That is not a fair hearing in which the inspector chooses or controls the witnesses, or prevents the accused from procuring the witnesses or evidence *or counsel he desires . . .*" (Stress added.)

In *Gilles v. Del Guercio,* 150 F.Supp. 864, 867, absence of counsel coupled with improper evidence amounted to absence of due process. In *U.S. ex rel. Castro-Louzan v. Zimmerman,* 94 F.Supp. 22, the failure to provide counsel was not the sole cause but was an important reason for the Court deciding that a fair hearing had been denied.

In *Hyun v. Landon,* 219 F.2d 404, 406, this Court recently stated:

> "An alien in deportation proceedings must be afforded due process of law, including a fair

> hearing, . . . and indispensable to a fair hearing are reasonable notice, the right to examine witnesses and to testify and to present witnesses *and to be represented by counsel* . . ." (Stress added.)

See also from this circuit *Roux v. Commissioner,* 203 F. 413.

The bright light of due process begins to fade when the foregoing cases are opened to admit an imprisoned infant upon the scene.

The law has been careful to watch over infants. In California, by law, (Cal. Code of Civil Procedure, secs. 372, 373) where a minor is a party to an action or proceeding he must appear either by a general guardian or guardian ad litem. The Federal Rules of Civil Procedure, Rule 17 (c), likewise provide for the appointment of a guardian ad litem where the minor is not otherwise represented.

Legally, appellant was in need of protection. "A minor is presumed to be incapable of exercising a sound discretion over his affairs." (*DeLevillain v. Evans,* 39 Cal. 120.) Lest there be any doubt, factually, that he was incompetent to manage his affairs, listen to the ring of his words:

> "I can handle this myself."

Those were his words in answer to the question put to him at the October 4, 1929 hearing concerning the services of a lawyer. It matters not whether they were the words of a brash youngster, an inmate hardened by seven months of prison life, or a scared youth with false bravado. In any event, in the eyes of the law,

he was deserving of its protection. His words were a nullity. He was incapable of waiving his rights. Not only was there no "intelligent" waiver by the test of *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, there was *no* waiver.

> "It has been said that a minor can waive nothing, cannot consent, and nothing can be construed against him."
>
> (*Bartels Estate,* (Calif.) Myrick's Prob.Rep. 30.)

> "Courts do not permit his rights to be prejudiced by an act of his own, or of any other person."
>
> (*Johnston v. So.Pac.,* 150 Cal. 535, 89 P. 348.)

The fading light of due process has grown dim indeed. If one more factor is needed to extinguish it completely it is to be found in the illusory "admission" that constitutes the sole evidence against appellant on the vital element of entry.

In *U.S. ex rel. Shaw v. Van de Mark,* 3 F.Supp. 101, the Court held the proceedings to be unfair where the deportation order was based upon testimony of the alien at a time when she was insane and without counsel. No one could disagree with such a ruling. Is the case at bar any different?

In *Bridges v. Wixon,* supra, 326 U.S. 135, 156, 65 S.Ct. 1443, 89 L.Ed. 2103, there was more than merely the one piece of contaminated evidence. The Supreme Court said that unfairness would not be shown by proof that the decision was wrong or that incompe-

tent evidence was admitted and considered. The Court continued:

> "... But the case is different where evidence was improperly received, and where but for that evidence it is wholly speculative whether the requisite finding would have been made. Then there is deportation without a fair hearing which may be corrected on habeas corpus ..."

Without the record admission of appellant, it is not "speculative" as to whether the finding could be made —it is absolutely impossible.

CONCLUSION.

We sincerely believe that the record presented to the District Court exposed the gross unfairness of the proceedings upon which appellant's deportation has been ordered. The unfairness is such as should be remediable by habeas corpus. The District Court erred in refusing to examine the record and to grant the writ.

We can think of no simpler way of expressing our prayer than to quote the words of the Supreme Court in *Bridges v. Wixon,* 326 U.S. 135, 154, 65 S.Ct. 1443, 89 L.Ed. 2103:

> "... We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That

deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.''

Dated, San Francisco, California,
May 12, 1958.

Respectfully submitted,
FREDRICKS & SULLIVAN,
Attorneys for Appellant.

GUERNSEY CARSON,
Of Counsel.